Foreign States Have Additional Time To Apply To Set Aside Orders For Leave to Enforce Arbitral Awards, Singapore High Court Rules

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The General Division of the High Court of Singapore ("**High Court**") has issued a decision on a novel issue of interpretation of the State Immunity Act, finding that the time limited for a foreign state to set aside an order of court granting leave to enforce an arbitral award starts to run two months after the date it is served the order of court: *CNX v CNY* [2022] SGHC 53.

Our Comments

Based on the High Court's interpretation of section 14(2) ("**Section 14(2)**") of the State Immunity Act ("**SIA**"), where a foreign state has been served with a leave order to enforce an arbitral award ("**Leave Order**"), the foreign state has two months *plus* any time afforded to it in the Leave Order (which would be 14 days or such other period as the court may fix if the Leave Order is to be served out of the jurisdiction) to apply to set it aside.

In light of this decision, parties who are involved in proceedings concerning the enforcement of an arbitral award against a foreign state should be mindful that a foreign state is entitled to a minimum of two months to apply to set aside any Leave Order served on it, *in addition* to any timeline for doing so as set by the court and provided for in the Leave Order. Accordingly:

- A Leave Order against a defendant state should provide that, pursuant to Section 14(2), the defendant state has two months and 21 days to apply to set aside the Leave Order; or
- Where a Leave Order does not so provide, the defendant state should be separately notified that it has an additional two months under Section 14(2) to apply to set aside the Leave Order.

The High Court's decision on this issue is also unlikely to be changed by the promulgation of the new Rules of Court 2021 ("**ROC 2021**"), which came into effect on 1 April 2022, as Order 48 rule 6(5) of the ROC 2021 is *in pari materia* with Order 69A rule 6(4) of the Rules of Court previously in force, which was the regime applicable in the case.

This update takes a look at the High Court's decision.

Background

The plaintiff was a company incorporated in Ruritania ("**Plaintiff**") and the defendant, the sovereign state of Oceania ("**Defendant**").

In September 2013, the Plaintiff commenced an arbitration against the Defendant in respect of certain breaches by the Defendant of a bilateral investment treaty entered into between Ruritania and the Defendant. The arbitration was seated in Danubia.

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In May 2020, the arbitral tribunal found in favour of the Plaintiff and, in 2020, issued its final award ordering the Defendant to pay the Plaintiff a sum of more than US$90 million, excluding interest, costs and disbursements ("**Final Award**").

In September 2021, the Plaintiff applied *ex parte* before an Assistant Registrar of the High Court to seek leave to enforce the Final Award against the Defendant in Singapore under section 29 of the International Arbitration Act. At the time of the Plaintiff's application, the Defendant did not apply to set aside the Final Award in the courts of Danubia and the time for the Defendant to institute such setting-aside proceedings had expired.

The Assistant Registrar granted the Plaintiff's *ex parte* application for leave, and the Leave Order stated that the Defendant may, pursuant to Order 69A rule 6(4) of the Rules of Court, "*apply to set aside [the Leave Order]* ***within 21 days*** *after service of [the Leave Order] on the [Defendant]*" (emphasis added).

The Leave Order was served on the Defendant's foreign ministry in Oceania by the High Commission of Singapore on 20 October 2021 in accordance with section 14(1) of the SIA.

On the face of the Leave Order, the last day for the Defendant to apply to set aside the Leave Order was 10 November 2021.

On 9 November 2021, the Defendant instructed Singapore counsel and, on 10 November 2021, applied to the High Court for more time to set aside the Leave Order. In particular, the Defendant sought, among other things, a declaration that it may apply to set aside the Leave Order within two months and 21 days from the date it was served the Leave Order (i.e., that the Defendant had until 11 January 2022 to set aside the Leave Order).

The High Court's Decision

The High Court held that the Defendant, being a foreign state, had a total of two months and 21 days to apply to set aside the Leave Order.

The ruling was premised on the High Court's view that an application by a foreign state to set aside a Leave Order granted under Order 69A rule 6 of the Rules of Court that were previously in force and served in accordance with section 14(1) of the SIA constitutes a "*corresponding procedure*" to an entry of appearance under Section 14(2) read with section 2(2)(b) of the SIA ("**Section 2(2)(b)**"), such that the time limited for a foreign state to set aside the Leave Order would, by virtue of Section 14(2), begin to run only two months after the date on which the Leave Order is served on it.

The High Court reasoned as follows:

- Section 14(2) provides that:

  > Any **time for entering an appearance (whether prescribed by Rules of Court or otherwise) shall begin to run 2 months after the date on which the writ or document is so received**.
  >
  > (Emphasis added)

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- Section 2(2)(b) states that "*references to entry of appearance … **include references to any corresponding procedures***" (emphasis added).

- Interpreting the SIA purposively and reading Section 14(2) together with Section 2(2)(b), Section 14(2) is meant to apply to a range of procedures that are similar "*in substance*" to an entry of appearance, some of which may not have stages that are the same in "*texture and terminology*" to the steps of entry of appearance set out in section 14 of the SIA.

- Section 2(2)(b) extends the concept of "*entering an appearance*" under Section 14(2) to include "*any corresponding procedures*", and the phrase "*any corresponding procedures*" used in Section 2(2)(b) is broad and meant to be inclusive.

- In proceedings where leave has been granted to enforce an arbitral award against a foreign state and the Leave Order has been served on the foreign state in accordance with section 14(1) of the SIA, the corresponding procedure to an entry of appearance would be the next step that the foreign state is required to take to communicate its intention to challenge the Leave Order, which would be the foreign state's application to set aside the Leave Order.

- This conclusion accords with the legislative purpose of Section 14(2). The fact that Section 14(2) gives states a longer timeline to enter an appearance is an explicit recognition of the "*reality*" that states require more time to react to proceedings.

The High Court therefore found that the Defendant's application to set aside the Leave Order constituted a corresponding procedure to an entry of appearance under Section 14(2), and that the time limited for the Defendant to set aside the Leave Order was governed by Section 14(2).

As to computation of time, the High Court determined that the proper approach to computing the time a foreign state has under Section 14(2) to enter an appearance is to:

(a) determine the "*normal*" or default time period the foreign state would have to enter an appearance as "*prescribed by Rules of Court or otherwise*"; and

(b) then add two months to that time period.

The High Court added that the phrase "*prescribed by Rules of Court or otherwise*" in Section 14(2) merely makes clear that the normal time limit for entering an appearance could be contained in the Rules of Court *or elsewhere*, and that where no time limit is specified in the Rules of Court, the words "*or otherwise*" would – as in this case – include a time limit contained in an order of court. In this regard, the High Court also made clear that the court's power to fix a timeline under the Rules of Court did not supersede or supplant the timeline prescribed under Section 14(2), and that such power only referred to the court's power to extend the period for setting aside a Leave Order beyond the minimum two months under Section 14(2).

Thus, where a foreign state has been served with a Leave Order to enforce an arbitral award, and the Leave Order stipulates a time limit for the foreign state to undertake a procedure corresponding to entering an appearance, the High Court was of the view that pursuant to Section 14(2), the time limit stated in the Leave Order begins to run two months after the date of service of the Leave Order.

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The High Court therefore held that, by virtue of Section 14(2), the 21-day limit in the Leave Order would begin to run only two months after the date on which the Leave Order was served on the Defendant (i.e., 20 October 2021), and that the Defendant was entitled to a total of two months and 21 days (i.e., up to 11 January 2022) to apply to set aside the Leave Order.

The High Court also provided further guidance that the additional two months provided to foreign states pursuant to Section 14(2) should be expressly stipulated in the Leave Order. Alternatively, the foreign state should be separately notified that it had an additional two months under Section 14(2) to apply to set aside the Leave Order.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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